Supreme Court, U.S.
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In The
Supreme Court of the United States

In Re: Summary Judgement of Race Discrimination Case

KELVIN J. HURDLE,

Petitioner.

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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5700

QUESTIONS PRESENTED

1. Is Procedural Due Process of the Fourteenth Amendment violated, when summary judgement is rendered and there are material facts that are in dispute and it is not "perfectly clear that there are no issues in the case"?

2. Is Procedural Due Process of the Fourteenth Amendment violated, when summary judgement is rendered and the trier of facts failed to view the most favorable of possible alternatives inferences from the evidence in plaintiff's behalf?

3. Is Procedural Due Process of the Fourteenth Amendment violated, when summary judgement is rendered in a case and there is direct evidence of charts that show a disparate of treatment between whites similarly situated?

4. Do unreasonable and historically hostile comments of a white supervisor, creates a sufficiently severe, pervasive or abusive work environment and violates the First Amendment of a protected class employee?

5. Does the continual unlawful acts of discrimination occurring within the requisite time period and motivated by the same upper manager but not same supervisor, sufficient to resuscitate a discriminatory demotion and reassignment claim?

6. When the court allows a handwriting expert to distinguish signatures that are in dispute; is summary judgement for the respective issue appropriate?

PARTIES TO THE PROCEEDING

Petitioner

Kelvin J. Hurdle,

Respondent

Virginia Department of Environmental Quality

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The opinions of the United States Court of Appeals for the Forth Circuit in Kelvin I. Hurdle, Plaintiff-Appellant, versus The Commonwealth of Virginia, Department of Environmental Quality, Defendant-Appelle are unpublished. Copies of the Opinions are reproduced in the Appendix hereto at Appendix pages at 1 and 25. The Orders of the District Court for the Eastern District of Virginia are included in Appendix at Appendix page 4, 26 and 27.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its Mandate on the judgement entered by the court on July 16, 2001. A timely filed Petition for Rehearing and Rehearing En Banc was denied on August 22, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The court's jurisdiction is invoked pursuant to 28 U.S.C § 1254 (1) and 2106.

STATUTORY PROVISIONS INVOLVED

This action is brought on behalf of Kelvin J. Hurdle seeking to implement the provisions of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e, et seq. This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985, and in particular, the due process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth, Seventh, Ninth and Fourteenth Amendments. This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency

functioning in Richmond, Virginia, and a substantial part of the events giving rise to this complaint that occurred in Richmond, Virginia. Defendant, The Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

STATEMENT OF THE CASE

Mr. Hurdle is an African-American male. He has been employed by DEQ since 1988, when he was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development Manager ("TD Manager"). 0n November 18, 1998, during an alleged reorganization of the DEQ, Mr. Hurdle was reassigned to the position of Environmental Engineer Senior. This was the second move of Mr. Hurdle out of the TD Manager's position. The first move occurred in 1997 where a White female as Training Manager replaced Mr. Hurdle for 180 days. Mr. Hurdle was recalled to the TD Manager's position in February 1998 where he met the requirements of the job. It is the reassignment to the position of Environmental Engineer Senior in the Waste Division and the unsupported performance assessment of not meeting the job expectations that triggered Mr. Hurdles' various claims of race discrimination.

Mr. David Paylor the Manager motivated the continued discrimination made the assessment that the training manager's " job was essentially administrative and was graded too high" when Mr. Hurdle was in the position. When Mr. Shelton was given the training manager's duties the grade level for the duties were ranked at a grade 16. Mr. David Paylor the Manager motivated the continued discrimination, made comments to Mr. Hurdle stating to Mr. Hurdle that he was not going to have him making claims of racial discrimination. This event occurred while Mr. Hurdle was in his new position as Environmental Engineer Senior in December 1999.

Plaintiff was required to accept an Environmental Engineer Position or be terminated. While working in the Environmental Engineering position, Plaintiff was consistently subjected to unequal terms and conditions of employment because of his race black. A white male co-worker also an Environmental Engineer reports to the same supervisor as the plaintiff. Plaintiff's Supervisor, allows white male counterpart to work for overtime pay in order to complete projects. Yet plaintiff's requests for compensation time for overtime hours already worked and were routinely denied. Plaintiff's and plaintiff's white male counterpart's workload would be considered equal. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

Plaintiff is frequently the target of derogatory comments by his supervisor. Plaintiff has on several occasions requested that his supervisor cease the use of derogatory comments. On or about May 17, 1999 the supervisor commented in a derogatory tone " I am going to whip you into shape". Within a month of that date, he commented " you don't have common sense". Other comments included "you have a warped mind", and "you don't have common sense". Nearly all-verbal communications by the supervisor are done with malice and in a condescending manner.

Plaintiff's co-workers have witnessed plaintiff's supervisor make racially foul comments pertaining plaintiff. White employees are not subjected to the same environment. The supervisor behavior is sufficiently severe and pervasive that it alters the conditions of the plaintiff's employment. Additionally, the behavior creates and abusive working environment. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

While working as an Environmental Engineer, plaintiff requested historical letter information that was stored on a computer disc that would assist in the performance of his job.

The request was made and denied twice. Later, plaintiff personally observed a newer white male DEQ employee, using the same computer disc the plaintiff requested request six months earlier. Plaintiff is subject to unequal terms and conditions of employment. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

Plaintiff has been intentionally placed in a working position and denied the necessary opportunities and reasonable accommodations as routinely provided for white employees. Plaintiff has worked for over 11 years and has met or exceeded the expectations of the position. Plaintiff supervisor fraudulently affects plaintiff performance by changing original correction request for letters, and pretends the requested corrections were original. The supervisor ridicules plaintiff about not including comments that were not originally requested. White employees are not subjected to the same behavior. The supervisor behavior is sufficiently severe and pervasive that it alters the conditions of the plaintiff's employment. Additionally, the behavior creates an abusive working environment. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

On Friday, December 3, 1999, at 4:00 p.m. plaintiff attempted to discuss with management the Title VII violations. Management denied that discrimination had occurred, and refused to gather facts or investigate plaintiffs concerns. Plaintiff was told by Mr. Dave Paylor (Deputy Director) that if he believed that discrimination had occurred, he should "Play your hand". Plaintiff's credibility was questioned by management and plaintiff was denied due process to resolve his complaints of discrimination. In contrast, personnel issues are heard when presented by white employees. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

Plaintiff is currently suffering retaliation as the result of participating in a protective activity (protesting discrimination) and attempting to discuss the Title VII issues with management. Previous erroneous performance ratings issued to plaintiff and subsequently reversed by management are re-appearing as the result of plaintiffs attempts to discuss incidents of racial discrimination with management. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

A facially neutral test such as the decision making processes and hiring practices disproportionately impact blacks. Blacks are excluded from first line supervision in nearly all first lines supervision positions. Higher positions than first line supervisors are mainly acquired through the political appointment process. There exists a pattern and practice of discrimination.

DEQ management promised plaintiff it would change the reporting structure and assign plaintiff to a new supervisor. Plaintiff had reminded management that this action was taken by management when two white employees had a conflict. Management changed the reporting structure to alleviate the conflict with the white employees. Management continued to allow the hostile and abusive environment to exist for plaintiff and did not make the promised change of reporting structure. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

White employees that failed to meet performance expectations were given other jobs within DEQ where they were able to meet their expectations. The plaintiff has been moved from a position where he exceeded the expectations and has been placed in a position where the supervisor alleges that expectations are not met while taking actions to prevent plaintiff from accomplishing his expectations. Defendant's actions violate Title VII of the Civil Rights Act of 1964, as amended.

REASONS FOR GRANTING THE PETITION

1. **The Appropriateness of Defendants' Motion for Summary Judgement. DEQ'S motion for summary judgement is only appropriate if there are no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact.**

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Mr. Hurdle since he is the opposing the motion. Ross, Id., at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364. Eventes v. Shevin, 407 U.S. 67.(Federal Rule of Civil Procedure 38).

Federal Rule of Civil Procedure 56(C) required that the Court enter judgement against a party who, "after adequate time for discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317,322 (1966). The essence of the inquiry that the Court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby. Inc., 77 U.S. 242, 251-52 (1986). Summary judgement is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." Id., at 248.

2. The Demotion Decision Claim Is Timely Because it Represents a Continuing Violation

The defendant argues that Mr. Hurdle's claim that he was demoted for Training Manager's position because of his race is time barred because he filled this claim with the Equal Employment Opportunity Commission (EEOC) on February 9, 2000, which was more than 300 days after the demotion and occurred which was on November 1, 1998.

In order to avoid the "continuing violation" rule, defendant argues that the reassignment was "put into effect by John Cunningham, a black male, who is not implicated in Mr. Hurdle's claims of disparate treatment, hostile environment, and retaliation." This argument is without merit because the complaint that is before the Court is based on a Title VII claim and the proper party in such a claim is the employer named in the EEOC Charge of Discrimination. Mickel v. South Carolina State Employment Service, 377 F.2d 239,242 (4th Cir. 1967), cert. denied, 389 U.S. 877,88 S.Ct.177, 19 L.Ed.2d 166 (1967); Alvarado v. Bd. Of T. of Montgomery Com. Coll., 848 F.2d 457 (4th Cir. 1988).

Defendant argues that the Fourth Circuit has not explicitly adopted a continuing violation test. This assertion is simply not true in light of the holding in Brinkley-obu v. Hughes Training, 36 F.3d 336 (4th Cir. 1994) in which the Court stated that "[a]long with the Supreme Court, we have applied the doctrine of continuing discrimination to Title VII and Equal Pay Act compensation cases in which paychecks have been characterized as current or "continuing" violations. Nelson v. Stone, 958 F.2d 584, 592 (4th Cir. 1992); Brewster v. Barnes, 788 F2d 985, 993 (4th Cir. 1986); and Jenkins v. Home Ins. Co., 635 F2d. 310, 312 (4th Cir. 1980)

Given the litany of events that Mr. Hurdle has experienced during his employment with the defendant and which he claims are discriminatory and/or retaliatory, the defendant's contention that the demotion and reassignment

"simply constitute[d] the inevitable consequences of an earlier allegedly discriminatory decision do not suffice to create a continuing violation" is a factual determination that has been place in dispute by Hurdle in his response to the motion for summary judgement. The case cited by defendant, Thompson v. Town of Front Royal, Civ. Action no. 5:98cv 00083, 2000 U.S. Dist. LEXIS 15254, (W.D. Va. October 3, 2000) (unpublished) refused to apply the continuous violation rule regarding a series of separate but related acts because there was no evidence that an actual violation occurred with the requisite time period. The Court determined that assignment of the plaintiff to menial tasks after the plaintiff was promoted, did not resuscitate an earlier failure to promote claim.

In the instant case, Mr. Hurdle has alleged continual unlawful acts within the requisite time period, which does resuscitate his demotion and reassignment claim.

3. Mr. Hurdle Has Alleged a Meritorious Demotion Claim.

Defendant argues that Mr. Hurdle's demotion "does not state a claim of race discrimination." In arguing that Hurdle "has no direct proof that John Cunningham, an African American, intentionally discriminated against him" in the demotion decision, defendant failed to consider the rather suspicious explanation that Mr. Cunningham gave for the demotion in his affidavit, to wit, that he was motivated to demote Mr. Hurdle because he felt that Mr. Hurdle's career was stalling in the to return to substantive work for the agency." ¶14, Cunningham Aff. What is noteworthy about this claim was that Cunningham "unstalled" Mr. Hurdle's career by demoting him rater than granting his request for a lateral transfer. There is also the incongruity in Cunningham's statement that he "reviewed Mr. Hurdle's 1998 performance review [and] I felt Mr. Shelton gave him and "inflated grade" 14, Cunningham Aff. Cunningham signed this evaluation and while there was

space for him as the reviewer to make comments, he made no mention that he felt the grade was inflated. (Exhibit 17, Hurdle Transcript, Encl. I.)

Mr. Hurdle has met the order of proof courts should use in Title VII cases by establishing a prima facie case that he: (1) is in a protected class, (2) that he suffered an adverse employment action; (c) at the time, he was performing at a level that met his employer's expectations; and (d) that his position remained open or was filled by a qualified person outside the protected class. Texas Dept. of Community Affairs V. Burdine, 450 U.S. 249 (1981); Saint Mary's Honor Ctr. v. Hicks, 113 S.Ct.2742 (1993); Williams v, Cerebonics, Inc., 871 F.2d 452 (4th Cir. 1989).Wilson v. Taylor, 733 F2d 1539 (1984).

The first element is obvious, given that Mr. Hurdle is an African American. The second element, that he suffered an adverse personnel action is established by the fact that he was demoted one pay grade. It is immaterial that he did not experience a cut in salary. With respect to the third element, Mr. Hurdle was performing at a level that met his employer's expectations as evidenced by his 1998 performance review in which he was rated that he met the expectations of his position. (Exhibit 17, Hurdle Transcript, Encl. I.)

With respect to the last element, Mr. Hurdle's position was taken by Joe Shelton, a white male who had virtually no experience in the duties of Training Manager. Defendant stated in its argument that David Paylor's assessment was that the training manager's "job was essentially administrative and was graded too high."The defendant propounded discovery to Mr. Hurdle. Mr. Hurdle's response to Interrogatory No. 7 created a factual dispute that makes summary judgement inappropriate regarding the demotion claim. Interrogatory 7 asked: "State any and all reasons that support your belief that the "demotion" identified in paragraph 4 of your complaint was the result of racial discrimination." Mr. Hurdle answered: "Joe Shelton, my supervisor as training manager, told me

that upper management had discussed removing me from the training manager position, and could not give him a reason for the action. When I asked for a legitimate, business reason for demotion, I received no answer.

There were also some peculiar and questionable circumstances surrounding my demotion. At the time of my demotion, Joe Shelton was in the position of Director of Human Resources, which was a Level 16 position. He told me that he was told by John Cunningham, Director of Administration that he was being taken out of his Human Resources position and would assume my duties as Training Manager which was a Level 14 position, at least when I performed those duties.

Shelton complained that if he assumed those duties, it would mean that he was going to receive a two level demotion from a Level 16 to a Level 14. Cunningham then made arrangements to have Shelton's new position changed from Training Manager to Assistant Director of Administration and the position was given a Level 16 designation. At the time of Hurdle's demotion, he received a satisfactory performance evaluation and he met of the requirement for the position. He was better qualified than Shelton to continue the duties as Training Manager because Shelton had absolutely no experience or training for that position.

Also, there was an existing vacancy in the Department for an Environmental Engineer, Level 14. I was minimally qualified for that position. I was not considered for that position despite the fact that there is a policy and practice in the Department that requires that prior to demoting an employee, that an attempt be made to laterally move that employee is minimally qualified. This policy was not exercised in my case, while it was exercised for Shelton's benefit."

Mr. Hurdle's answer to Interrogatory No. 7 created a reasonable inference that there was a motive to demote Mr. Hurdle, which was independent of reduction in force and restructuring plan by the

Agency. Mr. Hurdle asked for a reason and was not given one. The proffer by the defendant of an alleged legitimate and nondiscriminatory reason was only made after Mr. Hurdle complained about the demotion as being racially motivated. Mr. Hurdle also states in his answer that Shelton was to be given the training manager's duties and job title, but his job title was changed after he complained that if the title was not changed he would suffer a two pay grade demotion. It is interesting to note that Shelton remained in his pay grade 16 classification after he assumed the duties of training manager despite Paylor's assessment that the position "was graded too high."

Defendant argued that the reassignment affected both Mr. Hurdle and Shelton, "similarly." Given that Mr. Hurdle was demoted and Shelton remained in his pay grade and took on duties that Paylor considered was "too high" for grade 14, the argument that Mr. Hurdle and Shelton were similarly affected is laughable and without factual or logical merit.

Mr. Hurdle has met the prima facie showing requirements. At this point, the burden shifts to the defendant to establish legitimate, nondiscriminatory reasons for the reassignment. There is at this stage a genuine factual dispute as to whether the articulated reasons for the reassignment are legitimate or whether they are either false or pretext.

4. Mr. Hurdle Established a Factual Dispute Whether the Denial of Approval for Compensatory Time Was Discriminatory.

The record at this point with respect to Freeland's denial of Mr. Hurdle's request for compensatory time is as follows: Mr. Hurdle testified in his deposition that Shawn Davis, who Freeland had assigned to advise Mr. Hurdle, told Mr. Hurdle that he should get comp time for coming in on weekends as longed as he worked on annual reports. This caused Mr. Hurdle to raise comp time issue with

Freeland. Hurdle Depo. Tr. p. 92, lines 9-25. Mr. Hurdle also testified that Larry Syverson told him in specific and unequivocal language that received comp time for doing annual reports. Mr. Hurdle Depo. Tr. p. 93, lines 1-17.

Neither Romanchik nor Freeland denied that Syverson received comp time in their affidavits. As the nonmoving party, Mr. Hurdle is entitled to have his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, and that he be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).Wilson v. Taylor 773 F2d 1539 (1984).

5. DEQ Is Not Entitled to Summary Judgement on Mr. Hurdle's Hostile Work Environment Claim.

For purposes of argument, Mr. Hurdle will incorporate in this argument his claims of deficiencies in training and his negative evaluations.

The paradigm that Mr. Hurdle must satisfy in establishing his hostile environment claim, requires him to prove that (1) DEQ harassed him because of his race, (2) the harassment was unwelcome, (3) it was sufficiently severe or pervasive to create and abusive working environment, and (4) there is a basis to impute it to the employer. Smith v. First Union, 202 F.3d 234 (4th Cir. 2000); Spicer v. Virginia, 66 F 3d 705, 710 (4th Cir. 1995) (en banc).

DEQ argues that Mr. Hurdle's claims rise only to the level of disagreements, and hurt feelings that may have caused Mr. Hurdle stress, however, "there is no hint of racial harassment, or that Mr. Hurdle's reactions were reasonable." (DEQ's Brief, p.25)

There should be no question that Mr. Hurdle has met the second elements in the paradigm, that the conduct that he complained about was unwelcome. The first element, that he was so treated because of his race is met because there has been no showing that white employees of the defendant were exposed to

or suffered the same conduct as did Mr. Hurdle. Since DEQ is the moving party, Fed. R. Civ. P. 56(c) places the burden on it to show the absence of any genuine issue of material fact.

Except for its contention that Joe Shelton was similarly affected by the reassignment, DEQ has not shown a white person who was subjected to equivalent conduct. With respect to the third element, Mr. Hurdle has established the following specific instances in his response to Interrogatory No. 4 that DEQ propounded to him:

> (4) Please identify and fully describe each and every incident of racial discrimination, harassment and/or retaliation which you claim you were subjected to by any agent or employee of Defendant while you have been employed by DEQ, including the name of the offending employee, position of that employee, nature of the alleged racial discrimination, harassment and/or retaliation, the date of the alleged incident(s) and any adverse employment action, or threats thereof, suffered by you."
>
> **ANSWER:**
>
> The following represent incidents of racial discrimination, harassment and/or retaliation, all of which adversely affected the terms and conditions of my employment:
>
> a. In June 1998, I attempted to join in with a few HRO staff in a normal discussion. Carol Harris, a white female of DEQ/HRO, whose position is unknown called me "boy" and when I looked incredulously, at her, she repeated it. I told Joe Shelton about the incident and he said he would speak to her about it.

b. White staff has received personal faxes in the office and no action was taken against them. However, when I received a personal fax at the office, Howard Freeland gave me a written reprimand, which caused me, to be embarrassed, humiliated and depressed.

c. During the time I was under Howard Freeland's supervision, he created a hostile work environment. Nearly all of Freeland's verbal communications with me were done in a malicious and condescending manner. I constantly had to ask Freeland to calm down when he interacted with me. It was rare when Freeland was not hostile and argumentative toward me. Freeland's interaction with white staff completely different in that he communicated with them in a calm and pleasant demeanor. Examples of Freeland's derogatory comments directed at me are: He has said, "I am going to whip you into shape" On or about May 17,1999, he said to me, "You don't have common sense; you are not professional!" He also said to me, "You have a warped mind." I do not recall the date of the last comment.

d. Freeland treated me differently from my white coworkers regarding my arrival time at work. Freeland almost daily monitored my time of arrival at work. When I was fifteen minutes late, Freeland required me to fill out a leave request and charged my lateness to my accrued leave, while white staff were allowed to make up their late arrival by working the additional time at the end of the day and annual leave was not used to make up for their late arrival.

e. Freeland told me on several occasions that he did not have time to discuss my work acting as if he was too busy to engage me in positive and productive discussions. Immediately after saying

this to me, I watched him fraternizing with white male staff for a considerable length of time, which indicated to me that he was not that busy. When Freeland saw me watching him fraternizing, he would shut his office door.

f. The agency maintains a computer system on which is stored historical information regarding previous work done by the agency. This information is important in the work we do at the agency and it greatly simplifies a lot of the work we do. When I requested Freeland to allow me to access this information to assist me in working on my assigned projects, he regularly refused and whites were freely given access to this information. One example of this occurred when Jim Bernard, a white male, was given access to this information within a week after he arrived at the agency. When I mentioned this to Bernard and told him that I had been denied access to this same information, he acted surprised and told me that he would put the information in a common file that did not require limited access. On July 27, 2000, Bernard and I were traveling to Chatham, Virginia for a public hearing. During that trip, Bernard said to me without any prompting from me that he really believed that Howard Freeland is a racist. He said he came to that conclusion because Freeland treated me different from the way he treated my white coworkers.

g. From December 1998 to June 2000, there was a practice at the agency or at least in the department in which I worked to give all employees job training. Freeland refused to assure that I was given adequate training. For example, Freeland would set up specific training protocols for whites to assure that they were trained in specific areas of their duties and

responsibilities. He would monitor their training progress. Freeland refused to do the same for me. In fact, Freeland would instruct me to do a specific project knowing full well that I had not received any training in that area. My employment was adversely affected because it took far more time to do the work, and that would not have been necessary had I been given proper training. During the same time period, when whites first came to the department, they were assigned a mentor. I was in the department for more than eighteen months before Freeland got around to assigning me a mentor.

h. From December 1998 to the present, Freeland refused to approve compensatory time to offset the excessive time that I needed to complete my assigned projects, while he approved compensatory time for white staff on a regular and consistent basis.

i. From March 1999 to the represent, from time to time I would find an inadequate monitoring system for landfills in the State. When I made this observation in my reports, Freeland took issue with my findings and ordered me to reverse my opinion and certify that the monitoring system was working properly. He did this without giving or explaining to me a scientific justification as to why my observations and conclusions were wrong. When Freeland dealt with my white coworkers and reversed their findings and observations, he gave them a detailed scientific explanation. This was not simply a difference in his attitude and demeanor toward me, but he also deprived me of valuable training because by explaining his reasoning as he did with my white coworkers he provided them an opportunity to learn from their mistakes and to have positive feed back regarding their work.

j From December 1998 to September 1999, Freeland intentionally created a communication barrier during my first months on the job, effectively reducing the quality of my training. No training plan was ever devised, presented or reviewed with me. Although an overall plan was presented to HRO, its details were never reviewed. In contrast, quality training time was spent with new white employees this year. There were several acts of retaliation that occurred as follows:

1. After I was evaluated as meeting the requirements of the job, I was removed from the training manager's position in December 1998 and demoted. See my actually fact allegations in my Complaint.
2. On May 31, 2000, I was given an interim performance evaluation, which stated that I did not meet the requirements of my position. My federal complaint was filed on May 26, 2000 and served on the Department that same day. The Department and Freeland were aware of the complaint before the interim performance evaluation was prepared.
3. On June 8, 2000, I was given a counseling memo for alleged poor performance.
4. On July 28, 2000, I received a counseling memo for not attending a non-mandatory meeting on June 13, 2000, which was six weeks prior to the incident. The memo was given one day after I attended a pretrial conference with Judge Payne, during which he advised the Department to find me another position with another agency. I later spoke with the Department's Director, Dennis Tracey who was in the parking garage the following day on July 28, 2000. He

told me that since I have gone to court he was going to do what he had to do. Mr. Treacy was angry and drawn during the encounter in the parking deck. During my previous encounters with Treacy, he was always friendly. Freeland fraudulently changed a notation on a Report Cover Sheet, Tracking ID WP2000 1003 with a response date of 8/24/00 that was handed to me. On this sheet there was a circle drawn around the word "Yes" and a line drawn from the circle to the center of the sheet where another circle was drawn around the word "No". Freeland alleged that I made the handwritten entry and wrote the word "No" on the sheet, when in fact he was the one that did this. Freeland then reprimanded me for an act that he committed and repeated his false and fraudulent accusation in the presence of Leslie Romanchik on August 11, 2000. I notified Romanchik and Freeland regarding this on or about September 7, 2000.

The extent, frequency and duration of negative conduct on the part of DEQ employees, and especially Freeland, constituted racial discrimination, deficiencies in training and negative evaluations so that this Court can conclude that Mr. Hurdle was subjected to sufficiently severe or pervasive negative conduct that it created and abusive working environment.

5. DEQ is Not Entitled to Summary Judgement on Mr. Hurdle's Retaliation Claim. Mr. Hurdle has established a prima facie case of retaliation because he has shown (1) he engaged in a protected activity; (2) the employer took adverse action; and (3) there was a causal connection between the two.

Ross v. Communications Satellite Co., 759 F.2d 355, 365 (4th Cir. 1985). All of Freeland's conduct toward Mr. Hurdle after Mr. Hurdle filed a claim with the EEO of Virginia's Department of Personnel and Training on August 26,1999 is temporally related to this protected activity. Freeland's claim that his negative action grew out of his frustration with Mr. Hurdle can not be judged by the Court in a motion for summary judgment process. David Paylor's comments to Mr. Hurdle that he should not make claims of discrimination were taken by Mr. Hurdle as a threat and at this stage cannot be ruled out as not being retaliatory. Given the acrimonious relationship between Mr. Hurdle and his superiors, any effort by DEQ to prove that their actions were motivated by a legitimate, non-retaliatory reasons would require the Court to make a credibility determination. DEQ's argument that Mr. Hurdle suffered no adverse action is not supported by the record. The hostile work environment that was clearly evident is sufficient to establish that Mr. Hurdle in fact suffered adverse action.

CONCLUSION

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Mr. Hurdle since he is opposing the motion. Ross, Id., at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Mr. Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible

alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364.

The Appropriateness of Defendants' Motion for Summary Judgement. DEQ'S motion for summary judgement is only appropriate if there are no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact.

WHEREFORE, Mr. Hurdle requests that the Court rescinds and amends summary judgment.

Respectfully Submitted,

Kelvin J. Hurdle
Petitioner Pro-se
5001 Hallmark Court
Richmond, Virginia 23234
(804) 271-9315

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No. 01-1053

KELVIN J. HURDLE,

Plaintiff - Appellant

Versus

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(CA-00-336)

Submitted: June 29, 2001
Decided: July 16, 2001
[Entered: July 16, 2001]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kelvin J. Hurdle, Appellant Pro Se. Martha Murphey Parrish, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).3

PER CURIAM:

Kelvin J. Hurdle seeks to appeal the district court's order granting summary judgement against him on his Title VII claims. See 42 U. S. C. A. § 2000e to 2000e-17 (West 1994 & Supp. 2000). We have reviewed the record, the district court's opinion, and the materials submitted by the parties and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hurdle v. Virginia, No. CA-00-336 (E. D. Va. Jan.5, 2001). We deny Hurdle's motion for appointment of counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

August 30, 2001

MANDATE
[Entered: August 30, 2001]

TO: Clerk, District Court

FROM: Z. Yevone Jeffreys
Deputy Clerk

RE: 01-1053 Hurdle v. Commonwealth of VA
CA-00-336

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 7/16/01.

[ ]Order and Certified Copy of Judgment
[X]Opinion and Certified Copy of Judgment
[ ]Order on Costs
[ ]Other: _____
[ ]The record has been retained for us in case number _____

A copy of the judgment is enclosed to counsel/pro se parties.

cc: Kelvin J. Hurdle, Martha Murphey Parrish

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE

Plaintiff,

v. CIVIL Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

ORDER
[Entered January 5, 2001]

For the reason set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that the defendant's motion for summary judgment is granted and this action is dismissed with prejudice.

The Clerk is directed to send a copy of this Order to all counsel of counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: January 5, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE
Plaintiff,

v. CIVIL Action No. 3:00cv336

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

MEMORANDUM OPINION
[Entered: January 5, 2001]

Kelvin Hurdle filed this action on May 26, 2000, alleging racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The Complaint names Hurdle's employer, the Commonwealth of Virginia Department of Environmental Quality ("DEQ"), as the defendant, and asserts that DDEQ violated Title VII by: (1) subjecting Hurdle to disparate treatment based on race: (2) subjecting him to a racially hostile work environment; and (3) retaliating against him for exercising his rights under Title VII. Hurdle seeks injunctive and declaratory relief, compensatory and punitive damages, and attorney's fees.

The DEQ has moved for summary judgment on all of Hurdle's claims. For the reasons that follow the motion for summary judgement is granted.

STATEMENT OF FACTS

Hurdle is an African- American male. He has been employed by DEQ since 1988, when he was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training

and Development Manager ("TD Manager"). In November 1998, during a reorganization of the DEQ, Hurdle was reassigned to the position of Environmental Engineer Senior. It is this employment action that triggered Hurdle's various race discrimination claims.

A. Alleged Disparate Treatment

Hurdle's disparate treatment claim is a composite of three different kinds of treatment which neither single nor collectively amounts to a valid claim of disparate racial treatment. The facts, which comprise these claims are set forth below.

1. Job Reassignment

Hurdle's position of TD Manager was abolished during a reorganization at the DEQ. The duties of the position were incorporated into the job description of another DEQ employee, Joe Shelton, a white male who, during the reorganization, was reassigned fr0m Director of Human Resources to Environmental Quality Assistant Division Director. At the same time, Hurdle was reassigned to Environmental Engineer Senior in the DEQ Office of Waste Permitting. The DEQ official in charge of the reassignment was John Cunningham, DEQ's Director of Administration, who is a black male. Hurdle experienced no reduction in pay as a result of the reassignment. However, as a result of the reassignment, Hurdle was moved from a grade 14 position to a grade 13 position. Hurdle duties as Environmental Engineer involve providing technical assistance to solid waste disposal facilities, including reviewing their annual reports, drafting permit amendments, and evaluating various groundwater monitoring systems. Upon reassignment, Hurdle came under the supervision of Howard Freeland, a white male who is an Environmental Engineer Consultant in the Office of Waste Permitting.

2. Deficient Training, Supervisory Support, and Access to Tools of Job

Hurdle blames Freeland for having failed to train and support Hurdle on his new job. In that respect, Hurdle asserts that: (a) Freeland failed to train Hurdle for his duties in the drafting of permit amendments: (b) Hurdle was given a regular workload within two months of reassignment whereas his white colleagues received small workloads for their first eight months; (c) Freeland did not make himself accessible to Hurdle for general supervisory support during the first three to four months after his reassignment whereas, in contrast, Freeland was allegedly very accessible to Hurdle's white co-workers; and (d) he was denied access to a computer database that would have assisted him in the performance of his duties. DEQ has refuted each of these assertions by affidavit and by deposition excerpts. As to the alleged dearth of training, Freeland states that he provided Hurdle with informal training on permit amendments beginning in December 1998 (one month after Hurdle's reassignment). According to Freeland, Hurdle actually received more training than other new employees did. Leslie Romanchik, a white female who is the Director of the Office of Waste Permitting and Howard Foreland's supervisor, swears that Hurdle was "trained in the same manner as all other DEQ waste permit writers." In response to Hurdle's allegation about disparities in initial workload, Romanchik avers that Freeland gave Hurdle assignments just as he did with Hurdle's co-workers. As for the alleged disparities in Freeland's accessibility, Freeland says that he "spent, at least, and equal amount of time answering [Hurdle's] questions and probably more time than I spend with the others in my section." Freeland also states that he has no recollection that Hurdle was unable to access the computer database.

3. Refusal to Confer Certain Employment Benefits– Compensatory Time

Hurdle contends that Freeland refused to grant him compensatory time for overtime hours while Freeland granted compensatory time to one of Hurdle's white co-workers. However, Hurdle basis allegations on statements made to him by two co-workers that receive the compensatory time for doing regular work. The DEQ has shown otherwise.

According to DEQ policy, compensatory time is granted only to employees who obtain prior permission and who work overtime doing out-of-the- ordinary tasks such as attending public meetings or completing field work. Overtime hours spent doing "regular work such as reviewing annual reports" do not entitle an employee to compensatory time under DEQ policy.

B. Alleged Hostile Work Environment

In support of his claim of a hostile work environment, Hurdle sets forth a compilation of all of the facts asserted in support of this lawsuit. Rather than list each fact here, all of the facts listed in Section A, infra, and Section C, supra, are incorporated. Not mentioned in either Section A or Section C are the additional allegations:

1. DEQ employees made racist or allegedly racist comments to Hurdle, in particular: (a) In June 1998, Carol Harris, a white female DEQ employee, who was not involved in any personnel actions involving Hurdle, called Hurdle "boy;" (b) Freeland made several allegedly derogatory comments including, "I'm going to whip you into shape;" "You don't have commonsense; you are not professional;" "You have a warped mind," none of which appear to be based on Hurdle's race.

2. Hurdle allegedly received reprimands for workplace conduct for which white employees were not reprimanded. Specifically, Hurdle says that Freeland reprimanded him for receiving a personal facsimile in the office and for arriving late to work

3. "Nearly all of Foreland's verbal communications with [Hurdle] were done in a malicious and condescending manner. [Hurdle] constantly had to ask Freeland to calm down when he interacted with [Hurdle]."

C. Alleged Retaliation

Hurdle filed a discrimination claim with the EEO of the Virginia Department of Personnel and Training on August 26, 1999. Apparently, Hurdle filed this claim because of his dissatisfaction with an "interim evaluation" completed by Freeland and Romanchik during the summer of 1999. The interim evaluation graded Hurdle as "does not meet expectation." Hurdle claims that, subsequent to August 26, 1999,. Freeland took adverse actions against him in retaliation for the EEO claim.

On September 23, 1999, Freeland completed Hurdle's annual performance evaluation grading him as "fair but needs improvement' which made Hurdle ineligible for a performance-based salary increase for the year. After a discussion with Hurdle, Freeland raised the ratings on several elements of the evaluation, but the overall evaluation grade was unchanged. Hurdle appealed the evaluation to Romanchik who changed two elements, but left the overall grade at "fair but needs improvement." Hurdle next appealed to Dennis Treacy, who upheld Romanchik's evaluation. Finally, Hurdle appealed to Hassan Vakili, Environmental Manager II, who is an Iranian-born U.S. citizen.

Vakili states that he made this change after hearing Hurdle express concerns that his supervisors were "trying to get rid of him." Vakili consulted with his supervisor, David Paylor, and they decided to give Hurdle the relief he sought as a good faith gesture.

On September 12, 2000, Freeland completed Hurdle's second annual performance evaluation as an Environmental Engineer II. The grade on this evaluation was "does not meet expectations." (This grade is lower than "faire but needs improvement.") Leslie Romanchik has reviewed this evaluation and agreed with it.

As further support for his retaliation claim, Hurdle alleges that, during the review of his 1999 performance evaluation, he told David Paylor that he had been subjected to discrimination. Hurdle alleges that Paylor directed Hurdle not to tell anyone else about his accusations of discrimination. But, as Hurdle also asserts, Paylor actually said "Well, file your charge, play your hand, do what you got to do to prove that discrimination has occurred. I will not have you going around telling people that you have been discriminated against". Finally, on both May 31, 2000 and June 26, 2000, Freeland, Romanchik, and DEQ human resources employee, Peggy Hawkins, met with Hurdle to discuss his 1999 performance evaluation and strategies for improving performance in the upcoming year. They wrote a counseling memorandum to document the meeting. At these meetings, Hurdle was assigned a mentor, Larry Syverson. Hurdle asserts that these meetings "were not held in good faith, but in direct response to the law suit."

DISCUSSION

Federal Rule of Civil Procedure 56 provides that summary judgment is to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, show that there is no genuine issue as to the material fact and that the moving party is entitled to judgment as a matter of F.R.Civ.P56. The

mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is only that there be no genuine issue of material fact. *Jackson* v. *School Bd. of the City of Richmond*, 2000 U.S. Sist. LEXIS4474, *9 (E.D.Va. March 15, 2000) (Memorandum Opinion).

The evidence of the non-moving party must be believed and all favorable inferences are to be drawned in the party's favor. *Anderson* v. *Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court cannot make credibility determinations or weigh the evidence. *Reeves* v. *Sanderson Plumbing Prods.* 530 U.S. 133, 120 S. Ct. 2097, 2110 (2000) (citing *Lytle* v. *Household Mfg., Inc.*, 494 U.S.545, 554-55 (1990)). Therefore, summary judgment is only appropriate it, after considering the record in its entirety, not rational finder of fact could find for the non-moving party. Jackson, 2000 U. S. Dist. LEXIS 4474 at *12. When a careful consideration of the record reveals the absence of any genuine issue of material fact, it is "the affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial." *Felty* v. *Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) See Jackson, 2000 U.S. Dist. LEXIS 4474, at*12.

A. Disparate Treatment Claims

1. Demotion Claim

a. Timeliness of Claim

As Hurdle's counsel correctly conceded at oral argument, the discriminatory demotion claim is time-barred. A Title VII claimant must file a complaint with the EEOC within 300 days of the allegedly discriminatory action otherwise the action is time barred. 42 U.S.C. § 2000e-5 (e). *Saleh* v. *Virginia State University*, No. 3:97cv460, at 22 (E.D. Va. Feb. 25, 1999) (unpublished). Hurdle filed his EEOC claim on February 9, 2000. Three hundred days before February 9, 2000 was April 14, 1999. Thus to survive the

300-day deadline, any discriminatory acts must have occurred subsequent to April 14, 1999. Hurdle's demotion occurred in November 1998, six months before April 14, 1999. Thus, his claim that the demotion was a violation of Title VII is available only if the demotion may be characterized as a "continuing violation" "Characterization of events as 'continuing violations' is permissible only when the alleged incidents of discrimination constitute a 'series of separate by related acts such that the are manifested in a continuing violation.' " Saleh at 23 (citations omitted). "Furthermore, there must be a 'present violation' within the statutory period." Id. at 23-24 (citations omitted). "When these factors are met, a plaintiff alleging unlawful discrimination may seek redress for events occurring outside the applicable limitation period." Id. at 24.

In assessing the applicability of the continuing violation doctrine to alleged discriminatory acts, it is appropriate to apply the set forth by the Fifth Circuit in *Berry* v *Board of Supervisors of LSU*, 715 F.2d 971 (4th Cir. 1983), there being no controlling decision on the issue in our circuit. 1 Saleh at 25-27.

> The Berry test calls for examination of three non-exhaustive factors: 'The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The Second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence which should trigger an employee's awareness of and duty to assert his or here rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?'

Saleh at 25-2 (quoting Berry at 981). To show that the demotion was part of a "continuing violation" under the first two Berry factors, Hurdle must establish that the demotion was "so connected topically and temporally as to permit an inference: that it was continuous with the allegedly discriminatory conduct that occurred after April 14, 1999. To satisfy the third, and most important, Berry factor, Hurdle must show that the demotion was of such a nature that it did not put Hurdle on notice of the DEQ's discriminatory intent, thus making it reasonable that he did not bring his claim sooner.[1] See *Emmert* v. *Runyon*, 178 F, 3d 1283 (4th Cir. 2000), 1999WL 253632 **4 (4th Cir., Md.).

The demotion occurred in November 1998. John Cunningham, DEQ Directory of Administration, made the decision to reassign Hurdle. Each of Hurdle's additional allegations of discrimination, however, are attributed to Howard Freeland. Thus, the demotion claim is distinct from, and unrelated to, the remaining claims in that the demotion was effectuated by a different actor. Thus, Hurdle fails to meet the first Berry prong, relatedness of subject matter.

In addition, Hurdle does not meet the third part of the Berry test, permanence. It is undisputed that he disagreed with the reassignment from the outset. Indeed, he signed the October 1998 "Notice of Layoff or Reassignment" "under duress." Hurdles own contemporaneous response to the reassignment indicates that he was on notice of what he perceived to be the DEQ's discriminatory intent. Additionally, the permanence of a job reassignment (as compared to a one-time reprimand or refusal to grant one request for compensatory time) is the sort of permanence which should trigger an employee's awareness of and duty to assert his or her rights." Berry at 981.

Accordingly, even if the November 1998 demotion was discriminatory, it was not part of a continuing violation and is therefore time-barred. As a result, the defendant's Motion for Summary Judgement is granted with respect to Hurdle's claim of discriminatory reassignment.

2. Deficient Training, Supervisory Support, and Access to Tools of Job

" Am plaintiff may satisfy his burden on summary judgment by offering 'direct evidence of a purpose to discriminate or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact' that the plaintiff's protected trait was the reason for the employment action." Saleh at 34 (quoting Evans v Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996)). " If 'direct evidence' is lacking or insufficient, a plaintiff must proceed pursuant to the three-part framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 892 (1973." Id. McDonnell Douglas Corp establishes a framework of shifting burdens of production wherein (1) the plaintiff must establish a prima facie case of discriminatory intent on the part of the defendant; (2) the defendant may then rebut the presumption raised by the prima facie case by establishing that it had a "legitimate, non-discriminatory reason" for the employment action; and (3) the plaintiff then has the opportunity to show that the reason proffered by the defendant was actually a "pretext" for discrimination. McDonnell Douglas, 411 U.S. at 807.
In order to establish a prima facie case of discrimination under the McDonnell Douglas formulation, Hurdle must show that: (1) he is a member of a protected group; (2) he suffered some adverse employment action; (3) at the time of the adverse employment action, he was performing at a level that met his employer's legitimate expectation; and (4) the adverse employment action occurred under circumstances that raise an inference of unlawful discrimination. See St Mary's Honor Ctr. v Hicks, 509 U. S. 502, 506 (1993). 13

Genuine issue of material fact' that the plaintiff's protected trait was the reason for the employment action." Saleh at 34(quoting Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996)). "If direct evidence' is lacking or insufficient, a plaintiff must proceed

pursuant to the three-part framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 892 (1973)." Id. McDonnell Douglas establishes a framework of shifting burdens of production wherein (1) the plaintiff must establish a prima facie case of discriminatory intent on the part of the defendant; (2) the defendant may then rebut the presumption raised by the prima facie case by establishing that it had a "legitimate, non-discriminatory reason" for the employment action; and (3) the plaintiff then has the opportunity to show that 14.Hurdle claims to have suffered disparate treatment based o race in the following forms: (a) Freeland's failure to train Hurdle for the position of Environmental Engineer II; (b) Hurdle's large initial workload in that position as compared to the workload of white employees; (c) Freeland's comparative inaccessibility to Hurdle; and (d) Freeland's denial of Hurdle's request for access to a necessary computer database.

Hurdle meets part one of the prima facie showing, membership in a protected class. Also, there remain disputes whether Hurdle actually suffered adverse employment actions and whether he was meeting his employer's expectations at the time. Hence, for purposes of this motion, Hurdle has satisfied the second and third components of a prima facie case.

However, Hurdle has offered no evidence which would raise a genuine issue that the adverse employment actions, of which he complains, occurred under circumstances that raise an inference of unlawful discrimination. The inability to satisfy the fourth facet of the prima facie case is, of course, fatal to the continuation of this action.

To raise an inference of discrimination, Hurdle must offer some evidence from which a reasonable jury could conclude that race played a role in Freeland's actions toward Hurdle. "Disparate treatment claim cannot succeed unless the employee's protect trait actually played a role" in the employer's decision-making process. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993). Hurdle could raise the

inference tat Freeland's actions were based on race by; for example, setting for the facts that show that Freeland treated Hurdle differently form similarly-situated white employees. See e. g. Adams v. Hernderson, 1998 U.S. App. Lexis 31688, * 4 (4th Cir.1998) (per curium) (unpublished) (requiring the plaintiff to show that he engaged in conduct similar to white employees by that disciplinary measures enforced against him were more severe that those enforced against white employees).

Hurdle has offered not facts sufficient to meet the fourth prong of the prima facie case His only support for his allegation that Freeland's actions were racially-motivated comes in the form of his own conclusory statements in his affidavit and his own deposition testimony. For example, in his Memorandum in Opposition to Defendant's Motion for Summary Judgment, Hurdle states that: Hurdle, unlike Bernard and Syverson, both of whom are white, was not given permit amendment training for more than a year after he joined Freeland's unit. Bernard and another white permit writer, Jeff Christie, were given this training immediately upon their assignment to the unit. Moreover, their permit amendment assignments gave them overtime opportunities, which Freeland denied to Hurdle. Id. at ¤ 6. This recitation includes no citation to any sworn statement or deposition. And, the Court's review of the evidence reveals nothing to support these conclusory allegations.

In the absence of any genuine issue of material fact as to a racial motivation underlying Freeland's allegedly discriminatory actions, Hurdle fails to establish a prima facie case of race discrimination based on deficient training, disproportional workload, supervisory support, or access to the computer database. Thus, notwithstanding the possible presence of disputes about whether the so alleged adverse employment actions occurred at all and about Hurdle's performance on the job, the complete absence of any evidence that Hurdle experienced treatment based on race makes summary judgment appropriate since "the record, taken as a whole could not lead a rational trier of fact to find

for the non-moving party." Keegan v. Dalton, 899 F Supp. 1503, 1512 (1995) (quoting) United States v. Lee, 943 F. 2d 366, 368 (4th Cir. 1991)).

3. Refusal to Confer Certain Employment Benefits Compensatory Time

Hurdle's next disparate treatment claim arises from his allegation that Freeland "allows white male counterparts to work for overtime pay in order to complete projects. Yet plaintiff's requests for compensation time for overtime hours already worked and was [sic] routinely denied." Complaint Para. 5.

To establish a prima facie case of discrimination in the granting of compensatory time, Hurdle must establish that: (1) he is member of a protected class; (2)"[he] was entitled to the desired benefit; (3) the [DEQ] denied [him] this benefit; and (4) unprotected employees were granted the benefit." Keegan v. Dalton, 899 F. Supp. 1503, 1513 (E.D. Va. 1995) (Memorandum Opinion) (applying the McDonnell Douglass framework to plaintiff's allegation that she was denied an employment benefit, namely long-term training, based on gender). In Keegan, the court held that the plaintiff had failed to establish the second prong, entitlement to the benefit, by assessing the employer's policy regarding which employees could be awarded long-term training and concluding that the policy had been correctly applied in the decision to deny Keegan's application for such training. Id.

Hurdle has raised no genuine issue about whether he was entitled to compensatory time. His argument on this issue rests entirely on his unsubstantiated belief that two white co-workers received compensatory time for overtime hours spent doing their "regular" work. However, the DEQ's policy regarding compensatory time, and an exhibit identifying which employees received compensatory time for which job activities, show conclusively that DEQ employees may receive compensatory time only with the

permission of their supervisor and only for hours spent doing work that is outside of their usual day-to- day responsibilities. Nor has Hurdle shown that any white employee was awarded compensatory time for performing regular duties. (2)

Hurdle claims entitlement to compensatory time for overtime hours spent working on annual reports, and undisputed component of his regular job duties. He does not claim to have been engaged in the sort of out -of- the-ordinary work, which the compensatory time policy contemplates. He offers no evidence, which raises a genuine issue as to his entitlement to this benefit. He thus fails to establish a prima facie case of discrimination with respect to their award of compensatory time; and summary judgment in favor of the DEQ is warranted in this aspect of Hurdle's claim.

B. Hostile Work Environment Claim

As support for his claim that he was subject4ed to a hostile work environment based on race, Hurdle sets forth the entire collection of facts alleged in his lawsuit. To prevail on a hostile work environment claim, Hurdle must establish that he defendant engaged in conduct that is "sufficiently severe or pervasive to alter the conditions of a victim's employment and create and abusive work environment" based on the protected trait. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (19930. And, as explained above, Hurdle must show that the "severe and pervasive" conduct was racial in nature. Id., see also Hawkins v. Pepsico, Inc., 203 F. 3d 274, 281 (4th Cir. 2000).

In a case whose facts resemble clearly those presented here, the United States Court of Appeals for the Fourth Circuit recently emphasized that the "[l]aw does not blindly ascribe to race all personal conflicts between individuals of different races . . .. (2) In his deposition, Hurdle stated that he observed a co-worker, Larry Syverson, filling out a form requesting compensatory time for

overtime hours spent doing "regular" work, and that another co-worker, Shawn Davis, told him that compensatory time is available for "regular work. Hurdle Depo. At 92-96. Given the DEQ's policy and the affirmative showing by the DEQ that no white employee was given compensatory time for performing regular duties, this hearsay evidence of Hurdle is insufficient to create a dispute of fact.

Instead, legally sufficient evidence is required to transform an ordinary conflict [between employee and employer] into an actionable claim of discrimination. " Hawkins at 282. In Hawkins, the Fourth Circuit affirmed summary judgment in a hostile work environment claim asserted by an African-American employee based on the conduct of her white supervisor. Id. at 276. Hawkins alleged that: (1) her supervisor failed to adequately inform her of her responsibilities and aver her inadequate instructions; (2) her supervisor failed to acknowledge Hawkins' input and criticized her unfairly; (3) her supervisor told her that Hawkins was not of the caliber" to be a manager; and (4) her supervisor made inaccurate assessments in Hawkins'' evaluation. Id. at 277. Hawkins contextualized all of these allegations with a claim that her supervisor's conduct toward her was in marked contrast to the supervisor's conduct to white employees. Id. In addition, Hawkins claimed that the supervisor demonstrated similar conduct toward Hawkins' sole African -American co-worker. Id.

In affirming the district court's grant of summary judgment in favor of Hawkins' employer, the Fourth Circuit found that Hawkins had not shown that the problems "were racial in nature," Id. at 281, explaining that Hawkins' Complaints about [her supervisor's] management style toward her are without a hint of racial significance. Even if [the supervisor harbored some personal dislike of Hawkins that made Hawkin's job more difficult or stressful, 'an employer is not required to like his employees' . . .. And it is for PepsiCo, not the courts, to rule on the wisdom and

generosity of [the supervisor's] management practices. Thus, in the absence of sufficient evidence of racial harassment, the district court correctly dismissed Hawkins' claim. Id.

Hurdle's attempt to link Freeland's behavior to race consist of the following allegations: (1) Carroll Harris, a white DEQ employee, called Hurdle "boy" during a conversation in June 1998 and (2) Freeland's conduct toward Hurdle was different from his conduct toward white employees. First, Hurdle makes no showing that links racist speech by Harris to Freeland's conduct toward Hurdle, nor to any other fact included in Hurdle's hostile work environment claim. Second, as the Fourth Circuit explained in Hawkins, the plaintiff's conclusory statements regarding a racebased differential in treatment are insufficient to establish a prima facie case of hostile environment based on race. Even Hurdle's allegations regarding specific comments made by Freeland miss the mark of discrimination based on race. None of the statements which Hurdle attributes to Freeland, i.e."I'm going to whip you into shape; "you don't have commonsense; you are not professional!" "You have a warped mind," reflects any racial animus. Nor does Hurdle's allegation that Freeland's communications with him were generally "malicious and condescending" indicate racial animus.

In light of Hurdle's failure to raise a genuine issue of fact as to a racially-motivated hostile work environment, summary judgment against him on this claim is appropriate

B. Retaliation Claim

Hurdle claims that he suffered retaliation for having exercised his rights under Title VII. Section 704(a) of Title VII, 42 U.S.C. § 2000e-3 (a) provides in part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has . . . made a charge, testified, assisted, or participated in any manner n an investigation, proceeding,

or hearing under this title." The McDonnell Douglas framework applies to retaliation claims. Karpel v. Inova Health Sys. Serv., 134 Fl #d 1222, 1228 94th Cir. 1998). To establish a prima facie case of retaliation, Hurdle must demonstrate that: (1) he engaged in protected activity; (2) DEQ took adverse action; and (3) there was a causal connection between the protected activity and the adverse action. Id. The third

The third component is the most difficult one to assess, but it is crucial to the establishment of a prima facie case. If Hurdle establishes a prima facie case, the burden shifts to the DEQ to demonstrate a legitimate, non-discriminatory reason for the adverse action, Karpel at 1229. Finally, Hurdle can show that the DEQ's proffered reason is pretextual. Id.

As the plaintiff's counsel correctly conceded at oral argument, Hurdle fails to establish a prima facie case of retaliation.

1. Protected Activity

Hurdle's August 1999 claim filed with the EEO of the Virginia Department of Personnel and Training was a protected activity satisfying the first part of the test.

2. Adverse Employment Action

The Fourth Circuit has not yet adopted a standard for assessing whether an employment decision is an "adverse employment action" for the purposes of a Title VII retaliation claim. Smith v. First Union National Bank, 202 F.3d 234 n. 11 (4th Cir. 2000) (declining to adopt a standard). Other circuits are split over the issue whether an employment decision must be an "ultimate employment decision" in order to be considered and "adverse employment decision" for the purposes of a retaliation claim, Id. However, even under the most liberal standard, one which does not require that an employment decision be

classifiable as "ultimate", Hurdle fails to establish any adverse employment action for a simple reason: none of the actions he sets forth can be characterized as materially adverse. In order to be an adverse employment action, an action must be a "material [[adverse change in the terms and conditions of employment [and] must be more disruptive than a mere inconvenience or an alteration of job responsibilities." Harris v. General Motors Powertrain, 1999 U.S. 1999 U.S. App. LEXIS 309, * 10 (4th Cir. 1999) (unpublished) (quoting Crady v. Liberty Nat'l Bank & Trust Co., 99 F. 2d 132, 136 (7th Cir. 1993). Hurdle asserts that the following actions constitute adverse employment actions: (1) the September 23, 1999 performance evaluation which rated him as "fair but needs improvement" and was then upgraded to "meets expectations;" (2) the September 12, 2000 performance evaluation which rated him as "does not meet expectations:" (3) David Paylor's alleged admonition of Hurdle not to talk about his feelings of being discriminated against, and (4) the May 31, 2000 and June 26, 2000 strategy meeting with Freeland, Romanchik, and Hawkins. Neither Paylor's alleged threat, nor the May and June 2000 meetings were "changes" in the terms and conditions of employment." Further, the question regarding whether the 2000 performance evaluation was retaliatory is not properly before this court at this time because it was not included in the plaintiff's EEOC claim. Finally, the 1999 performance evaluation is not an adverse employment action because the rating of "meets expectations" had no materially adverse impact on the terms and conditions of Hurdle's employment. To the contrary, the "meets expectation" rating entitled Hurdle to a merit raise for that year.

3. Causation

Even if the 1999 performance evaluation somehow were to meet the "adverse employment action" component of the prima Facie case, Hurdle fails to establish the crucial third part, causation, Factors which the Fourth Circuit has considered in determining whether adverse employment actions were caused by an employee's protected activity include: (1) the temporal relationship between the protected activity and the adverse action: (2) whether the relevant decision-maker who effectuated the adverse action was aware that the employee had engaged in protected activity; and (3) whether similar adverse actions had occurred prior to the protected activity. See Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656-58 (4th Cir. 1998).

Supporting a finding of causation in this case is the undisputed fact that there is a temporal relationship between the protected activity and the evaluation: the 1999 performance evaluation was completed on month after Hurdle's August 1999 protected activity. Mitigation against a finding of causation however, is the undisputed fact that on July 16, 1999, Freeland completed and "interim evaluation" of Hurdle in which he rated Hurdle's performance and "does not meet expectations." This evaluation, completed before the protected activity, reflects and overall consistency in Freeland's assessment of Hurdle and weakens any inference of retaliation that may be drawn from the evaluation completed subsequent to the protected activity.

The temporal relationship between the protected activity and the adverse action is not enough to establish causation, see Dowe at 657, rather, there must be evidence that the relevant decision maker was aware of the protected activity, id. Hurdle has failed to raise a genuine issue of material fact as to the question of Freeland's knowledge of Hurdle's EEO claim. The absence of evidence of Freeland's knowledge, combined with the consistency in Freeland's

evaluation of Hurdle both before and after the protected activity, supports the conclusion that no "reasonable jury could return a verdict" for Hurdle. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 248 (1986). Thus, DEQ us entitled to summary judgment in Hurdle's retaliation claim.

CONCLUSION

For the foregoing reasons the defendant's Motion for Summary Judgment is granted as to all of the plaintiff's claims, i.e, (1) discriminatory demotion; (2) discriminatory failure to provide training, supervision, and support; (3) refusal to grant compensatory time; (4) hostile work environment; and (5) retaliation.

The demotion claim fails because it is time-barred. The claim of discriminatory failure to provide training, supervision, and support fails because of the plaintiff's failure to raise any genuine issue as to racial motivation. The compensatory time claim fails because of the plaintiff's failure to raise any genuine issue as to his entitlement to compensatory time. The hostile work environment claim fails because of the plaintiff's failure to raise any genuine issue as to racial motivation, And, finally, the retaliation claim fails because the plaintiff establishes neither knowledge of protected activity on the part of his supervisor nor a change in his supervisor's assessments caused by the protected activity. The action, therefore, will be dismissed with prejudice. The Clerk is directed to send a coy of this Memorandum Opinion to all counsel of record.

It is so ORDERED

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: January 5, 2001

UNITED STATES COURT OF APPEALS

FOR THE FORTH CIRCUIT

FILED
August 22, 2001
[Entered: August 22, 2001]

No. 01-1053
CA–00-336

KELVIN J. HURDLE

Plaintiff - Appellant
v.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF ENVIRONMENTAL QUALITY

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Kelvin J. Hurdle,
Plaintiff

Civil Action No. 3:00CV336

v.

VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Defendant.

ORDER
[Entered: April 25, 2001]

Having reviewed the Motion to Alter or Amend Judgement and submit "newly discovered evidence" that was mistakenly omitted on February 2, 2001 (Pleading No. 35) filed on February 22, 2001 and the Motion to Alter or Amend Judgement and submit additional "newly discovered evidence" (Pleading No. 36) filed on March 2. 2001 and the response brief and the reply brief; and it appearing that motions were filed beyond the time limit set by Fed. R. Civ. P. 59; and that the standards for newly discovered evidence relief have not been met; and it further appearing that the action is now on appeal to the United States Court of Appeals for the Fourth Circuit, it is hereby ORDERED that the Motion to Alter or Amend Judgement and submit "newly discovered evidence" that was mistakenly omitted on February 2, 2001 (Pleading No. 35) and the Motion to alter or Amend Judgement and submit additional "newly discovered evidence" (Pleading No. 35) are denied.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge

Richmond, Virginia
Date: 25 APR 2001

IN THE UNITED STATES DISTRCT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Kelvin J. Hurdle,
Plaintiff

v. Civil Action No. 3:00CV336

VIRGINIA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Defendant.

ORDER
[Entered November 8, 2000]

It is hereby ORDERED that the defendant's Motion in Limine to Strike Expert Witness is denied as moot because of the forthcoming decision on the defendant's motion for summary judgment.

The Clerk is directed to send a copy of this Order to the plaintiff and to counsel of record.

It is so ORDERED.

Robert E. Payne
United States District Judge
Richmond, Virginia
Date: November 8, 2000